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Ismadi bin Ismail v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO M-05–18 OF 2006
LOW HOP BING, HELILIAH AND RAMLY ALI, JJCA
18 MAY 2009

Criminal Procedure — Defence — Failure to raise defence — Defence of passive possession not raised at trial — Whether trial judge wrong not to have considered it of his own accord — Whether failure occasioned in miscarriage of justice — Whether duty of accused or counsel to raise defence at trial

The appellant was convicted and sentenced to death by the High Court after being found guilty under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA') of trafficking in 307.7g cannabis. According to the prosecution's case the appellant led a police party on drug prevention rounds into the kitchen of his house, where, from a cupboard, he took out an orange paper box and handed it to the policemen. The cannabis was found inside the box. However, when giving his defence under oath, the appellant denied he had taken out the box and handed it to the police. Instead, he said, the police party found the box after a search. The appellant also said either his wife or his friend, who both had access to the kitchen, could have concealed the drugs there. The trial judge found that actual physical exclusive possession of the drugs had been proved against the appellant. This triggered the presumption of trafficking under s 37(da)(vi) of the DDA. The judge also found the appellant had failed to rebut the said presumption on a balance of probabilities and that the prosecution had proved its case beyond reasonable doubt. The appellant appealed the decision to the Court of Appeal. At the Court of Appeal, the appellant argued that although the defence of passive possession was not taken at the trial to rebut the presumption of trafficking, the trial judge should have considered it of his own accord and his failure to do so had occasioned a miscarriage of justice. The court was asked to substitute the conviction of trafficking and the death sentence with a conviction of possession under s 6 of the DDA punishable under s 39A(2) thereof.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) The defence of passive possession was inapplicable in the present case. Actual physical exclusive possession had been proved by way of direct evidence and the weight of the cannabis had gone beyond the statutory trigger of 200g to raise the presumption of trafficking under s 37(da)(vi) (see para 35).

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(2) The trial judge's failure to consider the defence of passive possession was due to counsel's omission to raise it at the trial (see para 32). A

(3) In common law jurisdictions which applied the adversarial system, the parties had exclusive conduct and control over their own case. As a matter of public policy it was the duty of the respective parties and their counsel to ventilate their views on each particular issue for determination by the court, especially in a trial by judge alone without jury (see para 34). B

(4) There was no violation of art 8(1) of the Federal Constitution in the present case regarding the application of the defence of passive possession because on the facts the defence was not applicable (see paras 35, 39–40). C

[Bahasa Malaysia summary

Perayu disabitkan dan dihukum mati oleh Mahkamah Tinggi selepas didapati bersalah di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar dadah kanabis seberat 307.7g. Menurut kes pendakwaan, perayu membawa sepasukan polis yang dalam rondaan mencegah dadah ke dapur rumahnya, di mana daripada almari dia mengambil keluar kotak kertas berwarna oren dan menyerahkan kepada polis-polis tersebut. Kanabis didapati di dalam kotak tersebut. Walau bagaimanapun apabila memberi pembelaan di bawah angkat sumpah, perayu menafikan yang dia mengambil keluar kotak tersebut dan menyerahkan kepada polis. Tetapi sebaliknya, dia berkata, pihak polis menemui kotak selepas mengeledah. Perayu juga berkata sama ada isterinya atau kawannya, yang kedua-duanya mempunyai akses ke dapur, boleh menyembunyikan dadah di situ. Hakim perbicaraan mendapati bahawa milikan eksklusif fizikal sebenar dadah tersebut telah dibuktikan terhadap perayu. Ini membangkitkan anggapan pengedaran dadah di bawah s 37(da)(vi) ADB. Hakim juga mendapati perayu telah gagal untuk mematahkan anggapan tersebut atas imbangan kebarangkalian dan bahawa pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Perayu merayu keputusan tersebut ke Mahkamah Rayuan. Di Mahkamah Rayuan, perayu berhujah bahawa walaupun pembelaan milikan pasif tidak dipertimbangkan pada perbicaraan untuk mematahkan anggapan pengedaran dadah, hakim perbicaraan patut mempertimbangkannya dengan kemahuannya sendiri dan kegagalannya berbuat demikian menyebabkan ketidakadilan. Mahkamah diarah untuk menggantikan sabitan pengedaran dadah dan hukuman mati dengan sabitan milikan di bawah s 6 ADB boleh dihukum di bawah s 39A(2).

D E F G H

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Pembelaan milikan pasif tidak beraplikasi di dalam kes ini. Milikan eksklusif fizikal sebenar telah dibuktikan melalui keterangan terus dan berat kanabis telah melampaui had statutori 200g untuk membangkitkan anggapan pengedaran dadah di bawah s 37(da)(vi) (lihat perenggan 35). I

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(2) Kegagalan hakim perbicaraan untuk mempertimbangkan pembelaan milikan pasif adalah akibat ketinggalan peguam untuk membangkitkannya semasa perbicaraan (lihat perenggan 32).

(3) Dalam bidang kuasa common law yang mana menggunapakai sistem adversarial, pihak-pihak mempunyai tindakan eksklusif dan kawalan ke atas kes mereka sendiri. Sebagai perkara polisi awam ia adalah tugas pihak-pihak masing-masing dan peguam mereka untuk menyuarakan pendapat mereka atas setiap isu tertentu bagi penentuan oleh mahkamah, terutamanya dalam perbicaraan oleh hakim sendiri tanpa juri (lihat perenggan 34).

(4) Tidak terdapat pencabulan perkara 8(1) Perlembagaan Persekutuan dalam kes ini berkaitan permohonan pembelaan terhadap milikan pasif kerana atas fakta pembelaan tersebut tidak beraplikasi (lihat perenggan 35, 39–40).]

Notes

For a case on failure to raise defence, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1838.

Cases referred to

Chan Chor Shuh v PP [2003] 2 MLJ 26, CA (refd)
Chandra Bhawan v State of Mysore (1969) 11 SCWR 750 (refd)
Kewal Singh v Lajwanti AIR 1980 SC 161 (refd)
Lachmandas v State of Bombay 1952 SCR 710 (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241, CA (refd)
Nagappan a/l Kuppusamy v PP [1988] 2 MLJ 53, SC (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
Ong Ah Too v Regina [1955] MLJ 247, CCA (distd)
PP v Abdul Manaf Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)
PP v Hairul Din bin Zainal Abidin [2001] 6 MLJ 146, HC (refd)
PP v Haling Arala Jimjani [2008] 5 MLJ 331; [2008] 4 CLJ 163, CA (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
R v Kachikwu (1967) 52 Cr App Rep 538 (folld)
R v Porrit (1961) 45 Cr App Rep 348 (refd)
State v Mello & Anor (1999) 1 LRC 215 (refd)
State of WB v Anwar Ali (1952) SCR 284 (refd)
Wjchai Onprom v PP [2006] 5 MLJ 415; [2006] 3 CLJ 724, CA (refd)
Y Jeyamuraly Yesiah v PP [2007] 5 MLJ 224; [2007] 5 CLJ 605, CA (refd)

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Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 37, 37(da)(vi), 39A 39A(2) 39B
Evidence Act 1950 s 114(g)
Federal Constitution art 8(1)
Misuse of Drugs Act 1973 [SG] ss 2, 3
Penal Code s 302

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Tengku Amir Zaki (Deputy Public Prosecutor, Attorney General's Chamber) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] The appellant ('the accused') was charged in the Melaka High Court with trafficking in 307.7g of cannabis. At the end of the trial, he was convicted and sentenced to death under s 39B(2) of the Dangerous Drugs Act 1952. This is his appeal against the said decision. (A reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952).

[2] On 18 May 2009, after hearing submissions, we dismissed the accused's appeal, and affirmed the said decision. We now give our grounds.

THE PROSECUTION'S CASE

[3] On 6 February 2002 at about 9.30am, Chief Inspector Fauzi ('SP1') and members of his police party were on drug prevention rounds when they approached the accused who was outside his house talking to Kalsom bt Ismail ('SP2') and Mohd Rashid bin Jusoh ('SP3') who were there to collect rental from the accused.

[4] SP1 identified himself and asked Cpl Yahya to do a body search on the accused. Nothing incriminating was found. SP1 and his men then followed the accused into his house; and the kitchen. The door to the kitchen was locked. It was subsequently opened by the accused's wife Rahimah bt Mohamad ('SP6').

[5] SP1, Sgt Khalid ('SP5'), Cpl Jaafar (who was offered to the defence and who testified as SD3) and the accused proceeded to a cupboard in the kitchen area. From the cupboard, the accused took out an orange paper box ('exh P7') and handed it to SP1. In exh P7, SP1 found an aluminium package which wrapped the cannabis. SP1 then administered the statutory caution under s 37A(1)(b) to the accused and asked: *'Dadah yang dijumpai itu siapa punya?'*

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('Whose drug was it that was found?'). The accused replied that he had bought the drug from a Malay male by the name of Man. The accused did not know where Man lived.

[6] After a trial within a trial, the learned judge ruled that the answer given by the accused was admissible.

[7] SP1's evidence was corroborated by SP5.

THE DEFENCE CASE

[8] In giving his evidence on oath, the accused denied that he had taken out the orange box (exh P7) to hand it over to SP1, but the police party has instead discovered it as a result of a search.

[9] However, the accused's evidence was demolished by that of SD3 ('Cpl Jaafar') who had instead supported SP1's evidence.

[10] The accused further testified that his wife (SP6) and his friend, one Jepun, also had access to the kitchen area, and that they could have concealed the drug there.

LEARNED TRIAL JUDGE'S FINDING

[11] The learned trial judge did not believe the defence evidence and had rejected it. His Lordship found that:

(a) actual physical exclusive possession had been proved against the accused, thus activating the presumption of trafficking (in cannabis) under s 37(da)(vi);

(b) the accused had failed to rebut the said presumption on a balance of probabilities; and

(c) the prosecution had proved its case beyond reasonable doubt.

DEFENCE OF PASSIVE POSSESSION

[12] Learned defence counsel Mr Hisyam Teh Poh Teik relied on passive possession as a legitimate defence to rebut the presumption of trafficking and argued that the accused ought to have been convicted under s 39A(2). He cited five authorities viz:

(a) *Public Prosecutor v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146, HC;

(b) *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241, CA;

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(c) *Public Prosecutor v Abdul Manaf Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129;

(d) *Y Jeyamuraly Yesiah v Public Prosecutor* [2007] 5 MLJ 224; [2007] 5 CLJ 605, CA; and

(e) *Public Prosecutor v Haling Arala Jimjani* [2008] 5 MLJ 331; [2008] 4 CLJ 163 (CA)

[13] Learned deputy public prosecutor Tengku Amir Zaki bin Tengku Hj Abdul Rahman responded that the entire evidence has established that the accused was in actual physical exclusive possession of cannabis, and, while passive possession is recognized as a defence in law, it does not apply to the facts as found by the learned trial judge.

[14] In our judgment, the *locus classicus* which raises the concept of passive possession is the Privy Council case of *Ong Ah Chuan v Public Prosecutor, Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 at p 68 (FC), where the appellants were convicted and sentenced to death under the (Singapore) Misuse of Drugs Act 1973, which is substantially identical to our Dangerous Drugs Act 1952. The Privy Council recounted the relevant facts in these the two appeals at p 67 as follows:

> Ong Ah Chuan was observed by two narcotics officers to leave his flat carrying a plastic bag which he put into his car which was parked nearby. He got into the car and drove some twenty miles to a spot in Bukit Timah Road where he stopped the car, alighted and locked the car behind him. He was arrested by the narcotics officers who had followed him throughout his journey. He was searched and the car was searched in his presence. There was found a plastic packet on his person containing impure heroin which on analysis was proved to contain 3.84g of diamorphine, and in the plastic bag which he had been seen to put into the car, impure heroin was found with what was proved to be a content of 206g of diamorphine. His explanation that he was carrying it for his own consumption only and the reasons that he gave why it was necessary for him to transport so large a quantity from his own dwelling to another place were unsupported by any corroborative testimony, defied credulity and were disbelieved by the trial judges.
>
> Koh Chai Cheng had brought into Singapore from Malaysia a quantity of heroin for which an acquaintance, who was in fact a police informer, had pretended to him that a buyer had been found at a price of $20,000. The heroin was hidden in a concealed compartment at the back of the boot of his car and was found there when he was arrested as he got into it to drive away from a parking place where he had parked it for his meeting with the police informer. In the concealed compartment there were eleven packets of impure heroin with a total content of 1,256g of diamorphine. His denial of all knowledge of it and his explanation that it must have been planted there by the police informers after his arrival in Singapore were disbelieved by the trial judges who gave cogent reasons for their disbelief.

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[15] The point of law before the Privy Council turns upon the true construction of the Singapore Act, more specifically ss 2 and 3, the relevant portions of which merit reproduction as follows:

> 2. In this Act, unless the context otherwise requires –
>
> ...
>
> 'controlled drug' means any substance or product which is for the time being specified in Part I, II or III of the First Schedule to this Act or anything that contains any such substance or product; … 'traffic' means –
>
> (a) to sell, give, administer, transport, send, deliver or distribute; or
>
> (b) to offer to do anything mentioned in paragraph (a) above, otherwise than under the authority of this Act or the regulations made thereunder; and 'trafficking' has a corresponding meaning.
>
> 3. Except as authorized by this Act or the regulations made thereunder, it shall be an offence for a person, on his own behalf or on behalf of any other person, whether or not such other person is in Singapore to –
>
> (a) traffic in a controlled drug;
>
> (b) offer to traffic in a controlled drug; or
>
> (c) do or offer to do any act preparatory to or for the purpose of trafficking in a controlled drug.

[16] Lord Diplock who delivered the advice of the Privy Council introduced the concept of passive possession in the following passage:

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking under s 3 involves something more than *passive possession*...; it involves doing or offering to do an overt act of one or other of the kinds specified in para (a) of the definition of 'traffic' and 'trafficking' in s 2. (Emphasis added.)

[17] The concept of passive possession was applied in *Hairul Din bin Zainal Abidin* . There, at the time the accused was arrested, he was coming out of a lift holding a plastic bag which contained another package containing the dangerous drugs. The accused attempted to escape. Augustine Paul J (now FCJ) found the accused guilty of the amended charge of possession under s 39A, instead of trafficking under s 39B and explained at p 156 that in order for any act to come within the definition in s 2, it must be limited to the context of the scope of the acts enumerated in the definition section, that is to say, it must relate to an overt act which goes beyond *passive possession*. His Lordship also made mention of *passive possession* in *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401 (HC).

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[18] In *Mohamad Yazri bin Minhat,* the amount of drugs involved was 133kg of cannabis. The accused was seen driving the target car with the cannabis in it from one point to another. He was subsequently arrested in his house. Using a key seized from accused's bag in his room, the police gained access to the car and in it found various plastic bags of the cannabis on the front and back seats and in the boot of the car. This court, speaking through Gopal Sri Ram JCA (now FCJ), followed *Ong Ah Chuan,* and at p 247 agreed with the appropriate description of *'passive possession'* (as opposed to trafficking) in *Hairul Din bin Zainal Abidin,* and *Mohd Farid bin Mohd Sukis & Anor* at p 249, His Lordship illuminated that merely transporting a quantity of drugs from one point to another does not make the accused a trafficker, as it depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into. By reason of the large quantity of cannabis and the facts and circumstances therein, the conviction of trafficking as found by the High Court was affirmed on appeal.

[19] The defence of passive possession was rejected in *Abdul Manaf Muhamad Hassan* , where the accused was seated in the front passenger seat of a parked taxi when he was arrested. Upon a body search, numerous small packets of drugs were found in him: 50 small plastic packets in the right side pocket of his track top; 30 small packets in the left side pocket of his track top; and 20 small packets in each side of his trouser pockets were recovered. There were also a number of small packets tucked in his waist. The Federal Court, through the judgment of Arifin Zakaria FCJ (now CJ(M)), held that the respondent was not a *passive carrier*.

[20] In *Y Jeyamuraly Yesiah* , the accused was standing near a biscuit tin at a rubbish dump. When the police officer approached him and identified herself, the accused fled. After a short chase, the accused was arrested and brought to the original spot. The police officer then administered the statutory caution under s 37A(1)(b) to him and asked him to hand over any prohibited item. The accused then picked up the biscuit tin and handed it over to the police officer. Inside the biscuit tin were 150 plastic packets which, upon analysis, were found to contain 20.1g of *monacetylmorphine* ('MAM') (first charge) and 9.5g of a mixture of heroin and MAM (the second charge). The High Court convicted the accused of trafficking under the first charge under s 39B(2). In respect of the second charge, the accused was convicted of possession punishable under s 39A(2). On the defence of *passive possession*, relating to the first charge, Mohd Ghazali Yusoff JCA (now FCJ) said at pp 635 and 636:

> The evidence clearly showed that the said biscuit tin which contained the said dangerous drugs was in the custody and under the control of the appellant. This is what is termed as *passive possession* in several authorities. That the appellant had knowledge of the said dangerous drugs in the said biscuit tin has to be inferred from the circumstances as discussed earlier. We find that the evidence showed that he had

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knowledge. But to constitute trafficking under s 39B(1) of the Act, there must be mens rea possession accompanied by some overt act. We find no such evidence in this instant appeal. Further, we cannot use the presumption of possession under s 37(da) of the Act as has been decided in *Muhammed bin Hasssan v Public Prosecutor* [1998] 2 CLJ 170 (see also *Pendakwa Raya v Tan Tatt Eek* [2005] 1 CLJ 713). (Emphasis added.)

[21] *Haling Arala Jimjani,* is concerned with the arrest of the accused when he was wearing a pouch bag. Inside the pouch bag was a sachet which bore the words 'Tongkat Ali Ginseng Coffee'. Inside the sachet were 15 plastic packets which contained 193.76g of methamphetamine. At the time of his arrest, the accused was together with his wife, and both were standing by the road side. He was convicted of possession by the High Court. The appeal by the prosecution was dismissed. Abdull Hamid Embong JCA delivering the judgment of this court followed *Ong Ah Chuan,* in relation to the concept of *passive possession*.

[22] Where there is actual trafficking, as in *Wjchai Onprom v Public Prosecutor* [2006] 5 MLJ 415; [2006] 3 CLJ 724 (CA), *passive possession* is inapplicable. There the accused was caught conveying a very large quantity of cannabis from Thailand to Malaysia. It was safe to infer that the drug was intended for third person or persons, known or unknown. There were overt acts of the accused namely the active concealment of the drug on his person followed by its conveyance from Thailand to Malaysia. So it was not a case of mere *passive possession*: per Gopal Sri Ram JCA (now FCJ).

[23] The above authorities demonstrate that the defence of passive possession has, without a doubt, been accorded recognition by our courts. However, the applicability of the defence must be determined by reference to the facts and circumstances prevailing in each particular case. This leads us to the consideration of the applicability or otherwise of this defence in the instant appeal.

IS PASSIVE POSSESSION PROVED?

[24] Although the defence of passive possession was not canvassed at the trial, learned counsel contended that the learned trial judge ought to have considered it, and failure or omission to do so is a miscarriage of justice, citing *Ong Ah Too v Regina* [1955] MLJ 247 (CCA) S'pore); and *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26 (CA).

[25] The prosecution reverted to the learned trial judge's finding of facts that this was a case of the accused's actual physical exclusive possession.

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[26] We note that *Ong Ah Too* , revolves around a jury trial. The accused, and another, faced inter alia a principal charge, punishable under s 302 of the Penal Code. One of the grounds of appeal was that in the summing-up, the learned trial judge had not adequately put to the jury the defence of alibi. Whyatt CJ, delivering the judgment of the (Singapore) Court of Criminal Appeal, at p 248, held that it is a paramount principle of law that the case for the defence must be put adequately to the jury in the summing up.

[27] In this regard, we are of the view that it is necessary to make a distinction between a jury trial and a trial by judge sitting alone. Historically, in criminal charges, when jury trials were an integral part of our jurisdiction, or in England, where jury trials are still the practice there, the court must put a defence to the jury for consideration even it has not been specifically raised. Ashworth J in *R v Porrit* (1961) 45 Cr App Rep 348 at p 356 put it as follows:

> As has already been said, the issue of manslaughter was not raised at the trial, but there is ample authority for the view that a particular issue is not raised by the defence, it is incumbent upon the judge trying the case, if the evidence justifies it, to leave such issue to the *jury*. (Emphasis added.)

[28] Similarly, in *R v Kachikwu* (1967) 52 Cr App Rep 538, concerning another jury trial, Winn LJ remarked that:

> Nevertheless, it is perfectly clear that this court has always regarded it as the duty of the judge of trial to ensure that he himself looks for and sees any such possible answers and refers to them in summing up to the *jury* and takes care to ensure that the jury's verdict rests upon their having in fact excluded any of these excusatory circumstances. (Emphasis added.)

[29] It is to be noted that the instant appeal does not concern a jury trial. Hence *Ong Ah Too,* involving jury trial, is readily distinguishable.

[30] Be that as it may, we wish to state that *Ong Ah Too* , has been applied in *Chan Chor Shuh,* where one of the issues raised was in relation to the presence of an informer Wong, whom the defence submitted, took the role of an agent provocateur and should have been called or offered as a witness by the prosecution. The defence argued that since neither course was adopted by the prosecution, an adverse inference should have been drawn against the prosecution under s 114(g) of the Evidence Act 1950. The learned trial judge did not accede to the defence submission. On appeal, PS Gill JCA (later FCJ) in delivering the judgment of this court, dealt with the matter whether the trial judge's treatment of the accused's evidence in the context of the role of Wong amounted to a legitimate treatment. His Lordship explained that:

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A The law requires a trial judge to consider all of the evidence that has been adduced in support of the defence. A court must consider carefully whether a defence put forward is capable of raising a reasonable doubt in the prosecution's case.

B **[31]** It is significant for us to observe that in *Chan Chor Shuh,* at the trial, the defence did raise s 114(g) and the prosecution's failure to call Wong, either as informer or as agent provocateur; and the learned trial judge had actually considered this specific submission and declined to accede to the defence submission. In the circumstances, *Chan Chor Shuh,* is unhelpful to the defence.

C **[32]** We are of the view that, in the instant appeal, the learned trial judge's failure in considering the defence of passive possession was due to the omission by learned counsel to raise it at the trial. We are unable say that the learned trial judge's conduct of the trial could be construed as non-direction, misdirection or miscarriage of justice.

D

[33] The defence omission, to raise the issue of passive possession at the trial, makes it appropriate for us to echo the sentiment of Winn LJ in *R v Kachikwu,* that 'It is asking much of judges and other tribunals in trial of criminal charges to require that they should always have in mind possible answers, possible excuses in law which have not been relied upon by defending counsel or even, as has happened in some case, have been expressly disclaimed by defending counsel'.

E

F **[34]** This is particularly true in common law jurisdiction which applies the adversarial system, wherein the parties have exclusive conduct and control over their own case. As a matter of public policy, it is the duty of the respective parties and their counsel to ventilate their views on each particular issue for determination by the court, more specifically in a trial by judge alone, in the absence of the jury. Were it otherwise, a dangerous precedent may be set where learned counsel's, or for that matter the prosecution's, omission, negligence, recklessness, inadvertence or absence of mind would entitle the defaulting party to the benefit therefrom. Clearly, this cannot be the true position.

G

H **[35]** In our judgment, the specific finding of facts by the learned trial judge must be given due weight. This has been set out earlier in this judgment and no repetition is required. We identify no error in his finding. The weight of cannabis has gone beyond the statutory trigger of 200g and is not inconsiderable. It is 307.7g of cannabis, hence raising the presumption of trafficking under s 37(da)(vi). There is no question of invoking doubt presumption of possession and trafficking, as actual physical exclusive possession has been proved by way of direct evidence. In the circumstances, the

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prosecution is entitled to ask the trial court to invoke the presumption under s 37(da)(vi), which the trial court has correctly applied. Hence, on the facts, the defence of passive possession is inapplicable.

ARTICLE 8 OF THE FEDERAL CONSTITUTION

[36] In asking this court to interfere and substitute the conviction of trafficking and the death sentence with a conviction of possession under s 6 and punishable under s 39A(2), the defence called in aid *Y Jeyamuraly Yesiah* , and *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 (HC). The defence also refers to art 8(1) of the Federal Constitution which reads:

> 'All persons are equal before the law and entitled to equal protection of the law'.

[37] *Y Jeyamuraly*, has been considered above.

[38] In *Chia Leong Foo,* Augustine Paul J (now FCJ) at pp 724 and 725 considered the scope of the presumption provisions under s 37 and the burden and standard of proof placed on the accused once the presumption is activated. The relevant principles may be extracted as follows:

(1) Presumption provisions are enacted to provide evidence of the facts to be presumed upon proof of the basic facts which raise the presumed facts;

(2) Where there is evidence of the facts to be presumed and the presumption provisions are still invoked, it would mean that what has been proved to exist has, at the same time, also been presumed to exist. This is illogical as it would amount to facts which have been proved as also having been presumed;

(3) Where there is such other evidence, presumptions cease to apply as such evidence, being not inadmissible, is capable of proving the very facts to be presumed.

(4) Reliance on the presumptions provisions where there is available evidence of the facts to be presumed would be unfavourable to the accused, because:

(a) Where the court relies on a statutory presumption, it is bound to take the fact as proved until evidence to the contrary is given, on a balance of probabilities, to disprove it: see *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 (PC); *Nagappan a/l Kuppusamy v Public Prosecutor* [1988] 2 MLJ 53; and failure to discharge the burden, even where a reasonable doubt as to guilt exists, will be followed by a conviction: see *State v Mello & Anor* (1999) 1 LRC 215;

(b) If the court had acted on the available evidence in proof of the relevant

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ingredients without resorting to presumptions, there is only an evidential burden on an accused person to raise a reasonable doubt;

(5) Indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided;

(6) Fairness to the accused demands that the presumption provisions are used only when there is no evidence of the facts to be presumed;

(7) Arbitrary use of the presumption provisions without any fixed guidelines, when there is direct evidence of the facts to be presumed may also prejudice the accused in another way ie when invoked in one case and not in another, although there is direct evidence of the facts to be presumed in both instances, there may be a violation of art 8(1) of the Federal Constitution which guarantees equal protection of the law;

(8) The guarantee applies against substantive as well as procedural laws: see *Lachmandas v State of Bombay* (1952) SCR 710; *State of WB v Anwar Ali* (1952) SCR 248; *Kewal Singh v Lajwanti* AIR (1980) SC 161; *Chandra Bhawan v State of Mysore* (1969) 11 SCWR 750. It means that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence without discrimination: see *Shorter Constitution of India* by DG Basu (12th Ed) p 51;

(9) Where there is direct evidence of a fact to be presumed, the presumption cannot be invoked on the basis of a discretion; and

(10) The rule must be applied equally to all cases that fall within the same class so that there is no discrimination in the manner of conducting the defence. That would amount to a reasonable classification for the purpose of art 8(1).

[39] In our judgment, the applicability or otherwise of art 8(1) to the defence of passive possession must be determined by reference to the facts and circumstances of each particular case. It is only when the facts and circumstances are similar or on all fours that the defence of passive possession would apply. In other words, there must be a reasonable classification of the factual matrix before art 8(1) can be invoked. As have been clearly analysed and demonstrated above, not all the authorities cited for the defence had invoked this defence in the same way as day following night. The facts and circumstances in each particular case rule supreme there.

[40] In the light of the facts as found by the learned trial judge, we are of the view that there is no violation of art 8(1).

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CONCLUSION

[41] On the foregoing grounds, we dismissed this appeal and affirmed the decision of the High Court.

Appeal dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar